

(2012) 07 DEL CK 0278

In the Delhi High Court

Case No : Regular First Appeal (OS) 64 of 2012

M/s Vasari India Pvt. Ltd.

APPELLANT

Vs

Ghanshyam Dass Soni and Another

RESPONDENT

Date of Decision : 20-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6
Transfer of Property Act, 1882 — Section 108, 114

Citation : (2012) 07 DEL CK 0278

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : R.L. Kohli, for the Appellant; A.B. Dial and Ms. Ananya Datta, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.

Caveat No.731/2012

Counsel as above appears for the caveator and hence the caveat is discharged.

CM No.12201/2012

1. Notice.

2. Counsel for the respondents accepts notice and states that notwithstanding no reasonable or sufficient cause shown entitling the appellant for delay in filing the appeal to be condoned, he does not object to same being condoned.

3. Accordingly, CM No.12201/2012 is allowed.

4. Four days delay in filing the appeal is condoned.

RFA (OS) 64/2012

1. Learned counsel for the appellants states that the proof of the pudding lies in

its eating; may be true, but not when the pudding is stinking. Under a registered lease deed, the suit property was let out by the owners of the property, i.e. the respondents herein, to the appellant having its registered office at 610, Udyog Vihar, Phase V, Gurgaon, Haryana. The property let out, as per the lease deed, was the ground floor of premises bearing Municipal No.15A/53 and 15A/54, W.E.A. Ajmal Khan Road, Karol Bagh, New Delhi. The agreed period of lease was nine years, commencing from July 1, 2004. The lease was thus to come to an end on the mid night of June 30, 2013. As per the lease deed, the initial agreed rent was Rs. 3,31,000/- per month which had to increase every three years, as per clause 4 of the lease deed; wherein escalation by 12.5% has been agreed to between the parties every three years.

2. Clause 8 of the lease deed refers to the situation of the lessee being in default of rent. The clause reads as under:

8. That in case any cheque issued by the LESSEE for the payment of rent is dishonoured by the Bankers of the LESSEE and the same is not replaced by the LESSEE by a demand draft/Banker's cheque within 15 days of the notice, it shall constitute default in the payment of rent and in case there be such two consecutive defaults for the payment of rent for two consecutive month, the tenancy shall stand determined and terminated. The notice referred to shall be notices sent and serve by the registered AD post.

3. Alleging that the tenant paid the agreed rent upto June 30, 2007 and further paid agreed increased rent till February 2009, it was alleged in the plaint by the respondents that rent commencing from the month of March, 2009 became due and thereafter there was a continuous default in payment of rent till when the suit was instituted on the first day of May, 2010. In paragraph 10 of the plaint, it was averred that the default in payment of rent continued notwithstanding the plaintiffs having sent letters by registered post, acknowledgement due, on 5th and 15th June, 2009, 21st July, 2009, 15th September, 2009, 5th October, 2009. In paragraph 12 and 13, it was pleaded that even on February 24, 2010 notice was issued and served upon the tenant informing that there was a default in payment of rent. In paragraph 15 of the plaint, it was averred that lastly, on March 3, 2010 a legal notice by registered AD post was served upon the defendant calling upon the defendant to pay the arrears of rent but to no avail.

4. Pleading that there was apparently a default in payment of rent for more than two consecutive months in spite of notices being served by registered A.D. post, the suit was instituted praying a decree with respect to rent which had accumulated till suit was instituted, i.e., in sum of Rs. 32,77,339.00. Decree for ejectment, i.e. to be put in possession in the property was prayed for. Damages for continued unauthorized future occupation as also interest thereon was prayed for.

5. In the written statement filed, it was not denied that the appellant took the premises on rent as per the registered lease deed relied upon, as the foundation

of the claim in the suit. Being in arrears of rent was also not denied, but at the forefront was a defence predicated u/s 114 of the Transfer of Property Act. However, it was pleaded that the tenant, i.e., the defendant/appellant was not liable to pay service tax alleging that the same is the liability of the landlord. It was specifically pleaded in preliminary objection No.1 : "The defendant is however prepared to pay the rent due till date along with the interest and the costs of the suit and accordingly claims the relief against forfeiture for non-payment of rent u/s 114 of the Transfer of Property Act."

6. Having admitted not having paid the rent as claimed in the plaint, it is apparent that the first defence taken in the preliminary objection No.1 that the tenant was not liable to pay service tax is a defence prohibited by law inasmuch as service tax on commercial rented properties is an indirect tax and the jurisprudence on indirect tax tells us that the primary liability of the landlord to pay the tax to the Income Tax Authorities can be passed on to the tenant, for the reason as per the law it is the commercial use by the tenant which enhances the utility to the tenant with respect to the property which attracts service tax on commercial properties. It is apparent that the defence taken in preliminary objection No.1 with respect to service tax is prohibited by law.

7. With respect to the rent not being paid, as alleged in the plaint, it was not a case pleaded that the rent was paid. The default was admitted. However, with respect to the notices, pleaded in the plaint to have been served upon the defendant, there was a denial thereof.

8. Vide impugned order dated April 24, 2012, I.A. No.1004/2011, under Order XII Rule 6 CPC, filed by the plaintiffs/respondents, has been allowed and decree for possession has been granted. The learned Single Judge has held that landlord and tenant relationship is admitted. Rent being more than Rs. 3500/- per month is admitted and thus the property is outside the jurisdiction of the Delhi Rent Control Law. The learned Single Judge has noted that the default in payment of rent is admitted.

9. With respect to the defence predicated by the defendant i.e. the appellant, that it was entitled to a defence u/s 114 of the Transfer of Property Act, the learned Single Judge has noted that benefit thereof was already granted to the tenant in terms of the order dated February 2, 2011. The said order grants an opportunity to the defendant to pay the outstanding rent. The learned Single Judge has noted that rent has not been paid.

10. With respect to Section 114 of the Transfer of Property Act, suffice would it be to state that it is a defence available to the tenant to pray to be relieved against forfeiture of the tenancy, but for doing so, the tenant has to, at the first hearing of the suit, pay or tender to the landlord the rent which is in arrear, together with interest thereon and full cost of the suit. The appellant has not done so.

11. We have already noted hereinabove clause 8 of the registered lease deed. It

makes it a condition of the lease that rent would be paid punctually and expressly provides that if the tenant is in arrear of rent for two months, there would be a forfeiture of the lease, of course, the clause enjoins upon the landlord to serve a notice intimating the tenant that the rent has not been paid.

12. Section 108 of the Transfer of Property Act, 1882 enlists the rights and liabilities of the lessor and the lessee. Suffice would it be to state that clause (I) thereof, casts a legal duty on the lessee to pay or tender the agreed rent at the proper time and proper place. Thus, notwithstanding there being or there not being a term in the lease deed, it certainly would be the duty of every tenant to pay the rent to the landlord as per the agreement.

13. We do not dwell into the issue : Whether payment of rent and non-payment thereof is contemplated within the instant agreement to be a breach of a condition or the breach of a term of the lease agreement, leading to different cause of action accruing i.e. for recovery of rent or for recovery of possession, for the reason in the instant case the appellant admits in the written statement that it is in arrears of rent. Now, as per clause 8 of the agreement between the parties, the landlord was obliged to serve notice under Regd. A.D.Post upon the tenant informing that it is in default of rent by two months. The clause contemplates automatic forfeiture of the lease if in spite of said notice served the rent is not tendered.

14. The pleadings in the plaint, with respect to the various notices was sought to be made good by the respondents, who have filed the postal receipts as also AD cards evidencing that at the registered address of the appellant the notices were sent under Regd. A.D.Post and acknowledgment cards were received back under acknowledgement of receipt. The controversy sought to be raised with respect to the stamp affixed on the acknowledgment cards, bearing or not bearing the signatures of a person authorized to receive the notice on behalf of the appellant is not gone into by us, for the simple reason, law recognizes that a claim in a suit, upon summons in the suit being served upon a party, could be treated as a demand. Assuming previous notices were not received, when summons in the suit were served upon the defendant/appellant, at least then there was a demand served intimating that rent was due and payable for more than two months. The appellant was thus obliged to pay the rent when summons in the suit were served.

15. As noted hereinabove, in paragraph 1 of the preliminary objections in the written statement it was pleaded that decree cannot follow in view of the fact that the appellant is entitled to relieved against forfeiture as per Section 114 of the Transfer of Property Act, a right under a defence, which was made good in favour of the appellant, when as per order dated February 2, 2011, time was granted to the appellant to avail benefit of Section 114 of the Transfer of Property Act. No rent was paid. The appellant cannot thus project any case at all by way of defence.

16. We agree with the view taken by the learned Single Judge that instant case is a fit case where a decree on admission ought to have followed. We note at this stage the statement of fact made by learned senior counsel for the respondents that the decree impugned has been executed. The appeal is dismissed in limine without there being any order as to costs.